Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

25 June 2015*

(State aid — Export-credit insurance — Reinsurance cover provided by a public undertaking to its subsidiary — Capital contributions to cover the subsidiary's losses — Notion of State aid — Imputability to the State — Private investor test — Obligation to state reasons)

In Case T-305/13,

Servizi assicurativi del commercio estero SpA (SACE), established in Rome (Italy),

Sace BT SpA, established in Rome,

represented by M. Siragusa and G. Rizza, lawyers,

applicants,

supported by

Italian Republic, represented by G. Palmieri, acting as Agent, and S. Fiorentino, avvocato dello Stato,

intervener,

v

European Commission, represented by G. Conte, D. Grespan and K. Walkerová, acting as Agents,

defendants,

APPLICATION for annulment of Commission Decision 2014/525/EU of 20 March 2013 on the measures SA.23425 (11/C) (ex NN 41/10) implemented by Italy in 2004 and 2009 for Sace BT SpA (OJ 2014 L 239, p. 24),

THE GENERAL COURT (Seventh Chamber),

composed of M. van der Woude (Rapporteur), President, I. Wiszniewska-Białecka and I. Ulloa Rubio, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 December 2014,

gives the following

* Language of the case: Italian

Judgment

Background to the dispute

1 The applicants, Servizi assicurativi del commercio estero SpA (SACE) and its wholly owned subsidiary, Sace BT SpA, are active in the export-credit insurance sector, that is, insurance of export-credit risks in connection with the financing of transactions within the European Union and with a number of non-member countries.

Communication on export-credit insurance

2 On 19 September 1997, the Commission of the European Communities addressed a Communication to the Member States pursuant to Article [108(1) TFEU] applying Articles [107 TFEU] and [108 TFEU] to short-term export-credit insurance (OJ 1997 C 281, p. 4, 'the Communication on export-credit insurance'). That Communication, as amended by the Communications to the Member States of 2001 (OJ 2001 C 217, p. 2) and of 2005 (OJ 2005 C 325, p. 22), was applicable until 31 December 2012 following the amendment of its period of application by the Communication of 2010 (OJ 2010 C 329, p. 6). In point 4.2 of the Communication, the Commission had requested the Member States under Article 93(1) of the EC Treaty (which became Article 88(1) EC then Article 108(1) TFEU) to amend, where necessary, their export-credit insurance systems for marketable risks in such a way as to end the granting of State aid to private or public export-credit insurers in respect of such risks in the form of, inter alia, State guarantees for borrowing or losses, provisions of capital in circumstances in which a private investor acting under normal market conditions would not invest in the company or on terms a private investor would not accept, or reinsurance by the State, either directly, or indirectly via a public or publicly supported export-credit insurer, on terms more favourable than those available from the private reinsurance market.

3 Marketable risks were defined in the first paragraph of point 2.5 of the Communication on export-credit insurance, as amended by the Communication of 2001, 'as commercial and political risks on public and non-public debtors established in the countries listed in the Annex. For such risks the maximum risk period (that is, manufacturing plus credit period with normal Berne Union starting point and usual credit term) is less than two years'. The second paragraph of point 2.5 of the Communication on export-credit insurance, as amended by the Communication of 2001, further states that '[a]ll other risks (that is, catastrophe risks and commercial and political risks on countries not listed in the Annex) are considered to be not yet marketable'. The list of marketable risk countries comprises all the EU Member States and the OECD countries.

SACE

4 Before its transformation into a public limited liability company in 2004, SACE was a body governed by Italian public law, the SACE Institute. In 1998, in order to comply with point 4.2 of the Communication on export-credit insurance (see paragraph 2 above), the SACE Institute had stopped its marketable risks insurance activity for direct insurance contracts.

5 In 2004, SACE was transformed into a public limited liability company, the sole shareholder of which was the Italian Ministry of Economy and Finance (MEF). Subsequently, in November 2012, SACE was acquired by the Cassa depositi e prestiti, an Italian public body 70% controlled by the MEF.

6 Under Article 4(1) of its Articles of Association, SACE's object is insurance, reinsurance, co-insurance and guarantees against political risks, catastrophe risks, economic, commercial and exchange risks and further risks to which Italian operators and companies linked to or controlled by them are exposed in their activities with other countries and relating to the internationalisation of the Italian economy.

Under Article 4(2) of those Articles of Association, SACE also has as its object the provision, under market conditions and having regard to EU rules, of guarantees and insurance cover to foreign undertakings in relation to operations of strategic importance to the Italian economy from the perspective of internationalisation, economic security and activation of production and employment processes in Italy.

7 Decree Law No 269 of 30 September 2003, as converted, following amendments, into Law No 326 of 24 November 2003, Article 6 of which contains provisions on the transformation, as from 1 January 2004, of the SACE Institute into a public limited liability company (see paragraph 4 above), sets out the scope of SACE's operations, taking into account the development of the market concerned.

8 In this regard, Article 6(12) of Decree Law No 269 authorises SACE, in particular, to operate in the marketable risks sector under certain conditions. That article provides inter alia:

'SACE SpA may conduct insurance and marketable risk cover activities as defined by EU law. The activities referred to in this paragraph shall be conducted by maintaining separate accounts from those for activities benefiting from the State guarantee or by forming a [public limited liability company] for that purpose. In the latter case, the participation held by SACE SpA may be no less than 30% [and certain previously injected funds] may not be used for the subscription of its capital. [The activity of marketable risks cover] shall not benefit from the State guarantee.'

9 Article 5(1) of SACE's Articles of Association provides that liabilities entered into by that company in the exercise of its activities in the insurance, co-insurance and risk guarantee sector defined as non-marketable risks by EU rules benefit from the State guarantee on the basis of the rules in force. That provision also states that activities benefiting from the State guarantee are subject to deliberation by the Comitato interministeriale per la programmazione economica (Inter-Ministerial Committee for Economic Planning, CIPE) in accordance with the provisions of Legislative Decree No 143 of 31 March 1998 redefining the guarantee applicable to SACE under Italian Law No 227 of 24 May 1977. Under Article 2(3) of Legislative Decree No 143, the operations and categories of risks which may be assumed by SACE are to be determined by the CIPE. In addition, Article 8(1) of that Legislative Decree provides that, no later than on 30 June each year, the CIPE must deliberate the financial projections for SACE. The law approving the State budget defines the overall limits of the liabilities benefiting from the guarantee, drawing a distinction between guarantees according to whether their term is less than or more than 24 months.

10 Article 5(2) of SACE's Articles of Association excludes from the State guarantee activities conducted by SACE in the insurance sector and the marketable risks guarantee sector. It provides that such activities are to be conducted by that company either by establishing separate accounts or by forming a public limited liability company for that purpose.

Sace BT

11 In 2004, within the scope of the legislative framework described in paragraphs 8 to 10 above, SACE decided to form the subsidiary Sace BT as a separate entity, so as to isolate the management of 'marketable risks' within the meaning of the Communication on export-credit insurance. Sace BT had a share capital of EUR 100 million, financed entirely by SACE. In addition, SACE transferred capital amounting to EUR 5.8 million to the reserves of Sace BT.

12 Under Article 2(1) of its Articles of Association, Sace BT has as its object the exercise, both in Italy and abroad, of insurance and reinsurance activities in all areas of injury within the limits set by specific authorisations. Article 15(3) of those Articles of Association provides that members of the board of

directors are appointed and removed by the general meeting. Under Article 17 of the Articles of Association, management of Sace BT is the exclusive responsibility of the members of the board of directors.

13 According to Commission Decision 2014/525/EU of 20 March 2013 on the measures SA.23425 (11/C) (ex NN 41/10) implemented by Italy in 2004 and 2009 for SACE BT SpA (OJ 2014 L 239, p. 24, 'the contested decision'), during the material period Sace BT operated in the credit (54% of premiums in 2011), surety (30%) and other damage to property insurance sectors (13%).

14 Within the credit insurance segment, Sace BT was active in the short-term export-credit insurance business for 'marketable risks' within the meaning of the Communication on export-credit insurance. It also provided credit insurance for transactions within Italy (insurance of domestic trade transactions). Furthermore, for a small part of its portfolio, Sace BT had remained active in the short-term non-marketable risks segment (see recital 22, Table 1, of the contested decision). The contested decision states that, as submitted by the Italian authorities, this activity, as the others, was carried out on market terms and without the guarantee of the State.

Administrative procedure and the contested decision

15 Following a complaint received in June 2007, the Commission opened a preliminary investigation into possible State aid arising from various measures implemented by SACE in favour of Sace BT. In February 2011, the Commission initiated a formal investigation procedure pursuant to Article 108(2) TFEU in respect of the following four measures taken in favour of Sace BT:

— the initial capital allocation of EUR 100 million in the form of share capital and the capital contribution into reserves of EUR 5.8 million on 27 May 2004 ('the first measure');

— excess of loss reinsurance cover for the marketable risks for 2009, provided on 5 June 2009 and relating to the share of the risks (estimated at 74.15%) not covered by third-party operators on the market ('the second measure');

— a capital contribution of EUR 29 million provided on 18 June 2009 ('the third measure');

— a capital contribution of EUR 41 million provided on 4 August 2009 ('the fourth measure').

16 None of those four measures had been notified to the Commission, as the Italian authorities considered that they were not imputable to the State and that they were compliant with the private investor in a market economy test.

17 At the end of the formal investigation procedure, on 20 March 2013, the Commission adopted the contested decision.

18 To demonstrate that the measures at issue were imputable to the Italian State, in recital 177 of the contested decision the Commission relies on general criteria relating to organic links between the members of SACE's board of directors and the Italian State, the fact that SACE does not exercise its activities under market conditions, and the fact that by law SACE should hold no less than 30% of the capital of Sace BT. In addition, in recital 178 of the contested decision the Commission relies on specific indicators consisting in statements made by members of SACE's board of directors when the measures were adopted.

19 With regard to the existence of an advantage, the Commission takes the view, in recitals 127 to 130 of the contested decision, that the second measure confers an advantage on Sace BT on the ground that a private reinsurer would not have accepted such high reinsurance cover for it on the conditions granted

by SACE. With regard to the third and fourth measures, the Commission holds in recitals 132 to 168 of the contested decision that SACE did not act like a prudent private investor. It claims that the company did not conduct a prior evaluation of the profitability of the capital contributions at issue. For the sake of completeness, it additionally carries out a retrospective analysis of the profitability of those two measures and concludes that a private investor would have considered it better to let the subsidiary go bankrupt instead of investing an additional EUR 70 million.

20 In Article 1 of the contested decision, the Commission finds that the first measure, namely the initial capital allocation and the contribution to reserves, amounting to EUR 105.8 million, does not constitute State aid within the meaning of Article 107(1) TFEU. On the other hand, the other three measures ('the measures at issue'), namely the 74.15% excess of loss reinsurance, which contains aid amounting to EUR 156 000 (Article 2 of the contested decision), and the two capital contributions of EUR 29 million and EUR 41 million respectively (Articles 3 and 4 of the contested decision), are considered to be unlawful State aid which is incompatible with the internal market.

21 Under Articles 5 and 6 of the contested decision, the Italian authorities are required immediately to recover from Sace BT the abovementioned aid, plus compound default interest, to ensure that the contested decision is implemented within four months following the date of its notification and to keep the Commission informed, within two months following that notification, in particular of the total amount to be recovered, the amounts already recovered and the measures taken or planned to comply with the contested decision.

Procedure and forms of order sought

22 By application lodged at the Court Registry on 3 June 2013, the applicants brought the present action.

23 By document lodged at the Court Registry on 4 July 2013, the Italian Republic applied for leave to intervene in the present case in support of the form of order sought by the applicants. By order of 4 September 2013, the President of the Fourth Chamber of the General Court granted that application.

24 Following a change in the composition of the Chambers of the General Court, the Judge-Rapporteur was assigned to the Seventh Chamber, to which the present case was accordingly allocated.

25 By separate document lodged at the Court Registry on 26 February 2014, the applicants made an application for interim measures seeking suspension of operation of the contested decision pending a decision by the Court in the main action. By order of 13 June 2014, the President of the Court decided to suspend the operation of Article 5 of the contested decision in so far as the Italian authorities were required to recover from Sace BT an amount in excess of [*confidential*] [1] (order of 13 June 2014 in *SACE and Sace BT* v *Commission*, T-305/13 R, EU:T:2014:595).

26 The applicants, supported by the Italian Republic, claim that the Court should:

— annul the contested decision or, in the alternative, annul that decision in part;

— order the Commission to pay the costs;

— order any other measure, including any measure of enquiry, which it deems appropriate.

1 — Confidential data omitted.

27 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

28 In support of their application for annulment, the applicants rely on three pleas in law. By the first plea in law, the applicants dispute that the measures at issue can be imputed to the Italian Government. The second plea in law alleges infringement of Article 107(1) TFEU, errors of assessment and errors in law in the application of the private investor in a market economy test and an inadequate statement of reasons in respect of the second measure. The third plea in law alleges infringement of Article 107(1) TFEU and errors of assessment and errors in law in the application of the private investor in a market economy test in respect of the third and fourth measures.

The first plea in law, alleging that the measures at issue cannot be imputed to the Italian State

29 The applicants claim that the Commission misapplied Article 107(1) TFEU in holding that the measures at issue were imputable to the Italian State. The decisions introducing the measures at issue were adopted autonomously by SACE's board of directors.

30 The applicants claim that the contested decision does not contain any evidence to suggest that the measures at issue were an instrument for implementing a policy defined by the Italian State, that they were taken under its direct or indirect influence, or even that the Italian authorities had prior knowledge of them. It cannot be concluded from the general and specific indicators relied on by the Commission in paragraphs 177 to 179 of the contested decision that it was unlikely that SACE could have adopted the measures at issue without taking account of the requirements of the public authorities.

31 The Italian Republic, intervening in support of the applicants, adds that the fact, noted by the Commission, that the measures at issue satisfied an objective of general interest is not sufficient to conclude that the public authorities were involved. An undertaking could, whilst pursuing a profit-making objective, also take into account, for various reasons, the general interest determined autonomously by its directors.

32 The applicants and the Italian Republic further assert that the measures at issue were taken by SACE without taking account of the requirements of the public authorities and without those authorities having any influence, even indirectly. In the contested decision the Commission simply demonstrated the theoretical possibility of involvement by the public authorities. It did not prove sufficiently that the public shareholder had in practice exerted a dominant influence on the adoption of the measures at issue, contrary to the principle of the management autonomy of SACE's board of directors.

33 The applicants and the Italian Republic consider that the basic test for assessing whether a measure can be imputed to the State is to determine the degree of management autonomy enjoyed in practice by the board of directors of the public undertaking and the intensity of the control exercised by the public authorities. In accordance with the judgment of 16 May 2002 in *France* v *Commission* (C-482/99, ECR, '*Stardust*', EU:C:2002:294), in order to establish the involvement of the public authorities in the adoption of a measure, it must be shown that the decisive influence on the measure was the intervention of the State and not autonomous choices by the undertaking itself.

34 Consequently, according to the Italian Republic, a measure can be imputed to the State only if it is established that it is the consequence of a binding legal act of a public authority which, even if the instructions it contains are not precise and specific, led the undertaking to give precedence to an objective of general interest over its own interest and to adopt a different measure from that which it would have taken in the absence of such instructions.

35 In the view of the applicants and the Italian Republic, in this instance the Commission has not in any way proved that the Italian public authorities had established a practice of using SACE for purposes of general interest, which is contrary to the principle of the management autonomy given to public undertakings by the Italian rules, under which the MEF 'shall not exercise supervision or coordination in respect of companies in which it has a shareholding'. Thus, the Commission has not satisfied the burden of proof.

36 The Italian Republic adds that the MEF's practice of not interfering in decisions for which SACE's board of directors is responsible is attested by a note from that Ministry dated 12 November 2008, by which, in response to a request from SACE, it stated that the acquisition of a South African company operating in the credit insurance sector did not require its approval. This practice of respecting SACE's management autonomy is confirmed by a second note from the MEF which states that it is not within its power to interfere in the creation of a new services company controlled by Sace BT.

37 The Commission disputes those arguments in their entirety. In order to demonstrate that a measure can be imputed to the State, it is not necessary to establish that it exclusively fulfils a public purpose.

38 According to case-law, for advantages to be capable of being categorised as aid within the meaning of Article 107(1) TFEU, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State (see judgments in *Stardust*, cited in paragraph 33 above, EU:C:2002:294, paragraph 24, and of 10 November 2011 in *Elliniki Nafpigokataskevastiki and Others* v *Commission*, T-384/08, EU:T:2011:650, paragraph 50).

39 In these circumstances, it must therefore be examined whether the measures at issue could rightly be regarded as the result of conduct imputable to the State.

40 It is common ground that following its transformation into a public limited liability company wholly owned by the State, SACE was, during the material period, a public undertaking within the meaning of Article 2(b) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 2006 L 318, p. 17), which states that 'public undertaking' means 'any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'.

41 However, in paragraph 52 of the judgment in *Stardust*, cited in paragraph 33 above (EU:C:2002:294), the Court of Justice ruled that, even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question, to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved in any way in the adoption of those measures.

42 In the present case, it cannot therefore be presumed, from the mere fact that the Italian State, as the sole shareholder in SACE, was in a position to exercise a dominant influence over that company's activities, that it actually exercised its control in respect of the adoption of the measures at issue.

43 It is therefore necessary to recall the criteria identified in case-law for determining whether an aid measure adopted by a public undertaking can be imputed to the State (see paragraphs 44 to 52 below), before examining the indicators relied on by the Commission in this case (see paragraphs 53 to 88 below).

Criteria established by case-law for determining whether an aid measure granted by a public undertaking can be imputed to the State

44 In paragraphs 53 and 54 of the judgment in *Stardust*, cited in paragraph 33 above (EU:C:2002:294), the Court of Justice explained that it cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. Having regard to the close relations between the State and public undertakings, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent way, with the result that it will be very difficult for a third party, precisely because of the privileged relations existing between the State and a public undertaking, to demonstrate in a particular case that aid measures taken by such an undertaking were in fact adopted on the instructions of the public authorities.

45 Consequently, it is settled case-law that the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of sufficiently precise and consistent indicators, arising from the circumstances of the case and the context in which that measure was taken and justifying the presumption of the existence of the specific involvement of the public authorities in the adoption of that measure (see, to that effect, judgments in *Stardust*, cited in paragraph 33 above, EU:C:2002:294, paragraph 55; of 26 June 2008 in *SIC* v *Commission*, T-442/03, ECR, EU:T:2008:228, paragraph 98, and *Elliniki Nafpigokataskevastiki and Others* v *Commission*, cited in paragraph 38 above, EU:T:2011:650, paragraph 54).

46 In this regard, the judgment in *Stardust*, cited in paragraph 33 above (EU:C:2002:294), contains a list of non-mandatory and non-exhaustive indicators which have already been taken into consideration in the case-law or which are likely to be, such as the fact that the public undertaking which granted the aid could not take that decision without taking account of the requirements of the public authorities, the fact that the undertaking was linked to the State not only by factors of an organic nature, but it had to take account of directives issued by an inter-ministerial committee like the CIPE, the nature of the activities of the public undertaking and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law) or the intensity of the supervision exercised by the public authorities over its management (see judgment in *Stardust*, cited in paragraph 33 above, EU:C:2002:294, paragraphs 55 and 56 and the case-law cited).

47 In addition, in paragraph 56 of the judgment in *Stardust*, cited in paragraph 33 above (EU:C:2002:294), the Court also stated that any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains, might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State (see, to that effect, judgment of 30 April 2014 in *Tisza Erőmű* v *Commission*, T-468/08, EU:T:2014:235, paragraph 170).

48 First, it follows from that case-law that, contrary to the claims made by the Italian Republic (see paragraphs 33 and 34 above), the notion of the specific involvement of the State must be understood as meaning that the measure in question was adopted under the actual influence or control of the public authorities or that the absence of such influence or such control is unlikely, without it being necessary to examine the effect of that involvement on the content of the measure. In particular, it cannot be demanded, in order to satisfy the condition of imputability, that it be demonstrated that the

public undertaking's conduct would have been different if it had acted autonomously. As regards the objectives pursued by the measure in question, although they may be taken into consideration in determining imputability, they are not crucial.

49 The fact that in some cases objectives of general interest are consistent with the public undertaking's interest does not, in itself, offer any indication as to the possible involvement or lack of involvement of the public authorities in some way in the adoption of the measure in question. Consequently, the fact that the public undertaking's interest is consistent with the general interest does not necessarily mean that the undertaking could have taken its decision without taking account of the requirements of the public authorities. The Commission is thus entitled to point out that there is nothing to prevent the public authorities being able to require a public undertaking to conduct an entrepreneurial operation which, although it may, in some circumstances, satisfy the private investor test, can in any event be imputed to the State.

50 Second, the Italian Republic's interpretation of the rule in *Stardust* (see paragraphs 34 and 35 above), according to which the specific involvement of the State in the adoption of a measure by a public undertaking, like SACE, could only stem from a legal act of a public authority leading that undertaking to give precedence to objectives of general interest over its own interests or from the public authorities' practice of using that undertaking for purposes of general interest, in contravention of the principle of the management autonomy given to public undertakings by Italian law, must also be rejected.

51 It follows from the judgment in *Stardust*, cited in paragraph 33 above (EU:C:2002:294), that the autonomy conferred, by its legal form, on a public undertaking does not preclude the State from exerting a dominant influence in respect of the adoption of certain measures. As the possible specific involvement of the State was not excluded by the autonomy enjoyed in principle by the public undertaking, proof of such involvement may be provided on the basis of all the relevant facts and points of law which can form a set of sufficiently precise and convergent indicators of the exercise of actual influence or control by the State.

52 In this case the Commission therefore had to establish, on the basis of a set of sufficiently precise and convergent indicators, that the involvement of the Italian State in the decision to grant the measures at issue was specific or that the absence of such involvement was unlikely having regard to the circumstances and the context of the case.

Assessment of the indicators relied on by the Commission in this case

53 It must be determined whether, in the circumstances of the case and in the context of the measures at issue, it can be presumed on the basis of the indicators relied on by the Commission in recitals 177 to 179 of the contested decision, taken together, that the Italian public authorities had been specifically involved in any way in the adoption of those measures.

54 To demonstrate such involvement, the Commission relies on 'general indicators', which relate to the context for the adoption of the measures at issue (recital 177 of the contested decision), and 'specific indicators', which relate to the conditions for the granting of those measures (recitals 178 and 179 of the contested decision).

55 With regard to the general indicators, the Commission relies on the following three elements:

— all members of SACE's board of directors are appointed on a proposal from the Italian State;

— SACE does not exercise its activities 'on the market in normal conditions of competition with private operators';

— by law SACE must hold no less than 30% of the capital of Sace BT.

56 Each of these indicators must be examined in detail, before they are considered together.

57 First, as regards the argument relating to the appointment of members of the board of directors, raised in recital 177(a) of the contested decision, Article 6(2) of Decree Law No 269, which allots the shares in SACE to the MEF, provides that such appointments are made in agreement with the different ministries mentioned in Article 4(5) of Legislative Decree No 143, which refers to the Italian Minister for the Treasury, the Budget and Economic Planning (who was responsible for the economy and finance at the material time), the Italian Minister for Foreign Affairs, the Italian Minister for Industry, Commerce and Craft, and the Italian Minister for Foreign Trade.

58 However, as the Italian Republic stated at the hearing, it is clear from Article 6(24) of Decree Law No 269 that at the time of the creation of SACE Article 4 of Legislative Decree No 143 was applicable only for a transitional period until the approval of SACE's Articles of Association. Under Article 13 of those Articles of Association, members of the board of directors are appointed by the general meeting for a period of no more than three years and may be re-elected.

59 The applicants and the Italian Republic thus infer that the organic indicators mentioned in recital 177(a) of the contested decision are not the result of special rules, but stem from the ownership structure and are therefore negligible.

60 At the hearing the Commission argued that the repeal of the special rules governing the appointment of members of SACE's board of directors was not automatic. It asserts, without being contradicted by the Italian Republic, that when the measures at issue were adopted the members of SACE's board of directors had been appointed by the initial special procedure.

61 It is true that the members of the board of directors of an undertaking wholly owned by the State are necessarily appointed by the public authorities, as the State is the company's sole shareholder. However, in this case, the fact that, at the very least, the initial appointment of the members of SACE's board of directors was to be made, under a specific legislative provision, in agreement with several important ministries shows the special links between SACE and the public authorities and may constitute an indicator of the involvement of the public authorities in the public undertaking's activity.

62 In addition, such involvement is also shown by the fact, noted by the Commission in recital 178(a) of the contested decision, that two members of SACE's board of directors also performed management functions in ministries, namely the former Italian Ministry of Foreign Trade, now the Ministry of Economic Development, and the Italian Ministry of Foreign Affairs (see paragraph 85 below).

63 However, these organic indicators, although significant in so far as they demonstrate SACE's limited independence from the State, are not sufficient in themselves to establish the specific involvement of the State in the adoption of the measures at issue and must be assessed together with the other indicators.

64 Second, with regard to the argument that SACE does not exercise its activities 'on the market in normal conditions of competition with private operators', the contested decision takes account of the following four indicators:

— SACE's mission is to maintain and promote the competitiveness of the Italian economy and it essentially covers non-marketable risks within the meaning of the Communication on export-credit insurance (that is, it operated in a field which is not considered to be subject to normal conditions of market competition);

— the activity of SACE has always benefited from a State guarantee, which is not allowed under the State aid rules for other public undertakings operating in competition with private market operators;

— the financial statements of SACE are subject to the control of the Corte dei conti (Italian Court of Auditors) and the MEF has to present annual reports to the Italian Parliament as regards its activity;

— regarding the influence of the State on the allocation of SACE's resources, the CIPE has to deliberate every year not later than on 30 June on the financial projections as well as financial needs related to certain risks and to define global limits for the non-marketable risks to be assumed by SACE, distinctly for the guarantees of a duration of less than and more than 24 months.

65 It is necessary to assess the scope in this case of these four indicators which, according to the Commission, are actually intended to demonstrate that the public authorities use the SACE Group not only in the non-marketable risks sector, but in the marketable risks sector, to support the system of undertakings in Italy and thereby to promote the country's economic development.

66 The first indicator mentioned in paragraph 64 above relates to SACE's mission of promoting the competitiveness of the Italian economy, which 'essentially covers non-marketable risks'. It should be noted in this regard that neither the applicants nor the Italian Republic dispute the Commission's description of SACE's mission in the contested decision. They thus appear implicitly to acknowledge that SACE's mission, in so far as it essentially, but not exclusively, covers non-marketable risks, also extends to the competitive sector of insurance of marketable risks. The scope of SACE's general interest mission is apparent from Article 4(1) and (2) of the company's Articles of Association, which defines its object (see paragraph 6 above). Thus, Article 4(1) of the Articles of Association refers generally to cover of 'political risks, catastrophe risks, economic, commercial and exchange risks and further risks to which [Italian] operators and companies linked to or controlled by them are exposed in their activities abroad and [relating to] the internationalisation of the Italian economy'. Article 4(2) expressly mentions the provision, under market conditions and having regard to EU rules, 'of guarantees and insurance cover to foreign undertakings in relation to operations of strategic importance to the Italian economy from the perspective of internationalisation, economic security and activation of production and employment processes in Italy' (see paragraph 6 above).

67 That general interest mission, which explicitly includes cover for risks which are defined as marketable risks in the Communication on export-credit insurance (see paragraph 3 above) and, in addition, refers to the provision of insurance services under market conditions in respect of operations of strategic importance to the Italian economy, thus goes beyond the simple mission of providing cover for non-marketable risks, which does not fall within the competitive sector.

68 Consequently, the general interest mission entrusted to SACE by its Articles of Association also includes insurance of marketable risks, to cover which Sace BT was created (see paragraphs 8 and 11 above).

69 In recital 177(b)(i) of the contested decision, the Commission states that that mission is to promote 'the competitiveness of the Italian economy and it essentially covers non-marketable risks' (see paragraph 64 above). Although it thus places special emphasis on the objective of general interest pursued by SACE in the non-marketable risks insurance sector, the Commission nevertheless mentions the general objective of supporting the Italian economy conferred on SACE by Article 4(1) and (2) of its Articles of Association in respect of all its activities, which can therefore be exercised in the marketable risks insurance sector, as is clear from Article 6(12) of Decree Law No 269 (see paragraph 8 above).

70 The second indicator referred to in recital 177(b) of the contested decision (see paragraph 64 above) concerns the State guarantee from which SACE benefits. Unlike the first indicator examined in paragraphs 66 to 69 above, that indicator relates solely to SACE's activity in the non-marketable risks insurance sector. It is expressly stated in Article 5(2) of SACE's Articles of Association that, during the material period, 'insurance and risk guarantee activities defined by EU rules as marketable risks [did] not benefit from the State guarantee and [were] governed by private insurance rules'.

71 That indicator relating to the State guarantee does confirm, however, that SACE's activities were not activities exercised by a commercial export-credit insurance company under market conditions, but that they were activities of a public insurance company benefitting from exceptional status and pursuing objectives of supporting the economy defined by the public authorities, utilising an export promotion instrument, in particular through the State guarantee (see paragraph 67 above).

72 The third indicator referred to in recital 177(b) of the contested decision (see paragraph 64 above) relates to the annual audit of SACE's accounts by the Corte dei conti under Article 6(16) of Decree Law No 269 and the MEF's obligation to present the annual report for SACE to the Italian Parliament under Article 6(17) of that Decree Law. As the Commission states, even though such audits are also required for other public undertakings, they do not apply to all public undertakings fully owned by the State, which confirms the general framework of the specific public control exercised in respect of SACE. At the hearing, however, the Italian Republic noted, without being contradicted by the Commission, that the most recent annual report for SACE to the Parliament was for 2008.

73 This third indicator is not decisive in itself. In so far as those financial and political controls, first, take place *a posteriori* and, second, relate in principle to all SACE's accounts or activities, they do not in themselves permit the presumption that the public authorities specifically influenced upstream decisions, such as the decisions relating to the measures at issue. The fact remains that the possibilities for control bear witness to the Italian State's interest in SACE's activities and they are therefore relevant as elements in the set of indicators on which the Commission relied.

74 The fourth indicator referred to in recital 177(b) of the contested decision (see paragraph 64 above) relates to the approval by the CIPE of financial projections and financial needs for SACE related to certain risks and the definition by the CIPE of global limits for the non-marketable risks to be assumed by SACE in accordance with Article 6(9) of Decree Law No 269, which refers to the provisions of Article 2(3) of Legislative Decree No 143 (see paragraph 9 above).

75 In this regard, the applicants claim that the CIPE's decision on approval merely transposes and formalises the projections already approved by SACE's board of directors. In actual fact, the objective of the procedure of approval by the CIPE (see paragraph 9 above) is solely to inform the State of the extent of its potential maximum risk exposure arising from the guarantee provided by it in respect of the insurance cover offered by SACE in the non-marketable risks sector. Moreover, the projections subject to such approval do not relate to Sace BT's activities.

76 These arguments cannot be accepted. The Commission rightly argues that the approval of the projections for SACE by the CIPE, which is the highest organ for coordinating and managing Italian economic policy, shows that that undertaking does not exercise its activities in conditions of full management autonomy and can thus be considered to act under the control of the public authorities, at least in respect of the adoption of important decisions.

77 SACE's main activity on the non-marketable risks market is covered by projections which, although drawn up by the company's board of directors, must be approved by the CIPE. Such a procedure of approval by the authority which sets the guidelines for national economic policy cannot be purely for information purposes. In the absence of any evidence to the contrary (see paragraph 83 below), it indicates that SACE is required to take account of the requirements of the public authorities in return for the State guarantee from which it benefits.

78 Third, the applicants and the Italian Republic contest any probative value for the indicator to the effect that under Article 5(2) of Sace BT's Articles of Association SACE's participation in the capital of that subsidiary cannot be less than 30% in accordance with Article 6(12) of Decree Law No 269 (see paragraph 55 above).

79 The applicants do rightly observe that a 30% participation does not allow SACE to control its subsidiary's activities. However, although such a provision does not in itself give sufficient grounds to presume that the public authorities were specifically involved in the adoption of the measures at issue, it does, in accordance with case-law, constitute an indicator arising from the context of such adoption which may be taken into consideration (see paragraph 45 above).

80 As the Commission notes, that participation can be regarded as seeking to ensure a certain level of public involvement in marketable risks insurance activity, through SACE, which was wholly owned by the State during the material period, and confirms that SACE is subject to a special legal regime, including in the abovementioned sector.

81 In those circumstances, taken together, the general indicators relating to the context in which the measures at issue were adopted, examined in paragraphs 55 to 80 above, prove to the required legal standard that those measures can be imputed to the State, having regard to their importance for the Italian economy.

82 In view of the compass and the object of the measures at issue, which total more than EUR 70 million, all the indicators relied on by the Commission, which concern the organic links established by specific legislative provisions between SACE and the public authorities (see paragraphs 57 to 63 above), the objectives of promoting the competitiveness of the Italian economy conferred on SACE by its Articles of Association (see paragraphs 66 to 69 above), State support in the form of a State guarantee provided to SACE in the exercise of its main activities (see paragraphs 70 and 71 above), prior (see paragraphs 74 to 78, above) and *a posteriori* controls (see paragraphs 72 and 73 above) exercised by the public authorities over SACE's activity, and a certain level of public involvement in the marketable risks insurance sector (see paragraph 80 above), show that it is unlikely that the public authorities were not involved in the adoption of the measures at issue.

83 That analysis is not invalidated by the Italian Republic's argument relating to the MEF's practice of not interfering in decisions of public undertakings, as is shown by two notes from that Ministry, which state that operations decided on by SACE's board of directors did not require its approval (see paragraph 36 above). First, as the Commission points out, those notes cannot be relied on in the present case in so far as they were not submitted to the Commission in the administrative procedure (see judgment of 25 June 2008 in *Olympiaki Aeroporia Ypiresies* v *Commission*, T-268/06, ECR, EU:T:2008:222, paragraph 56; see also, to that effect, judgment of 15 April 2008 in *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 54 and the case-law cited). Second, and in any event, the operations mentioned in the notes do not have the same implications, having regard to the objectives of supporting the competitiveness of the Italian economy, as the measures at issue. Lastly, the absence of formal approval cannot rule out the existence of specific involvement by the public authorities in the adoption of a measure. Such involvement is apparent in this case from all the indicators mentioned in paragraph 82 above.

84 Consequently, in the light of all the general indicators mentioned in the contested decision, the Commission had legitimate grounds to rely, in paragraph 180 of the contested decision, on the finding that SACE was closely linked to the Italian public authorities, which used it in their policy of supporting the activity of the Italian economy, in order to conclude that the measures at issue can be imputed to the State.

85 The relevance of the three general indicators is confirmed, moreover, by the specific indicators relied on in recitals 178 and 179 of the contested decision. They essentially relate to statements made by members of SACE's board of directors when the measures at issue were adopted.

86 It is true that the applicants and the Italian Republic claim that those statements, cited in recitals 178 and 179 of the contested decision, constitute circumstantial evidence that merely reflects the expectations of those who made them regarding the positive impact on the economy of the measures in question.

87 It should be noted, however, that the statements cited in recital 178(a) and (b) and in recital 179 of the contested decision, recorded in the minutes of the meeting of SACE's board of directors on 1 April 2009 and the minutes of the meeting of its board of directors on 26 May 2009, refer to objectives of general interest. The same holds for the considerations mentioned in recital 178(c) of the contested decision, taken from the minutes of the meeting of Sace BT's board of directors on 27 May 2009.

88 Even though, when considered separately, the abovementioned statements have only relatively low probative value, when assessed in the light of the general indicators relating to the context in which the measures at issue were adopted, such statements must be regarded as additional indicators confirming that the adoption of the measures at issue forms part of the pursuit of the objectives of supporting the Italian economy conferred on SACE.

89 On all those grounds, the first plea in law must be rejected.

The second and third pleas in law, essentially relating to infringement of the private investor in a market economy test and the obligation to state reasons

90 Before examining these two pleas in law, as a preliminary point note should be taken of certain principles from case-law relating to the private investor in a market economy test.

Preliminary remarks on the case-law relating to the private investor in a market economy test

91 According to case-law, the conditions which a measure must meet in order to be treated as aid for the purposes of Article 107 TFEU are not met if the recipient undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources, that assessment being made by applying, in principle, the private investor in a market economy test (see, to that effect, judgments of 5 June 2012 in *Commission* v *EDF and Others*, C-124/10 P, ECR, EU:C:2012:318, paragraph 78, and of 24 January 2013 in *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 70).

92 The private investor test is thus applied in order to determine whether, because of its effects, the advantage granted to an undertaking, in whatever form, through State resources distorts or threatens to distort competition and affects trade between Member States (see, to that effect, judgment in *Commission* v *EDF and Others*, cited in paragraph 91 above, EU:C:2012:318, paragraph 89). It should be noted in this regard that Article 107(1) TFEU does not distinguish between measures of intervention of a public body by reference to their causes or their aims but defines them in relation to their effects (judgments in *Commission* v *EDF and Others*, cited in paragraph 91 above, EU:C:2012:318, paragraph 77, and of 19 March 2013 in *Bouygues and Bouygues Télécom* v *Commission and Others*, C-399/10 P and C-401/10 P, ECR, EU:C:2013:175, paragraph 102).

93 In order to examine whether or not the Member State or the public body concerned has adopted the conduct of a prudent private operator operating in a market economy, it is necessary to place oneself in the context of the period during which the measures at issue were taken in order to assess the economic rationality of the conduct of the Member State or of the public body, and thus to refrain

from any assessment based on a later situation. The comparison between the conduct of public and private operators must thus be made in relation to the attitude which, at the time of the operation in question, a private operator would have had in similar circumstances having regard to the available information and foreseeable developments at the time (see, to that effect, judgment in *Stardust*, cited in paragraph 33 above, EU:C:2002:294, paragraphs 71 and 72). Consequently, the retrospective finding of the actual profitability of the operation performed by the Member State or the public body concerned is irrelevant.

94 That settled case-law was confirmed by the judgment in *Commission* v *EDF and Others*, cited in paragraph 91 above (EU:C:2012:318), which stated in paragraph 105 that, in particular for the purposes of applying the private investor test, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to conduct the operation in question was taken. That is especially so where, as in the present case, the Commission is seeking to determine whether there has been State aid in relation to a measure which was not notified to it and which, at the time when the Commission carries out its examination, has already been implemented by the public body concerned.

95 In accordance with the principles on the burden of proof in the State aid sector, the Commission must provide proof of such aid. In this regard, the Commission is required to conduct a diligent and impartial examination of the measures at issue, so that it has at its disposal, when adopting a final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible (see, to that effect, judgments of 2 September 2010 in *Commission* v *Scott*, C-290/07 P, ECR, EU:C:2010:480, paragraph 90, and of 3 April 2014 in *France* v *Commission*, C-559/12 P, ECR, EU:C:2014:217, paragraph 63). With regard to the standard of proof required, the nature of the evidence the Commission must adduce depends, to a large extent, on the nature of the State measure at issue (see, to that effect, judgment in *France* v *Commission*, cited above, EU:C:2014:217, paragraph 66).

96 Consequently, where it appears that the private investor test could be applicable, the Commission is under a duty to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the applicability and the application of that test are met (judgments in *Commission* v *EDF and Others*, cited in paragraph 91 above, EU:C:2012:318, paragraph 104, and of 3 April 2014 in *Commission* v *Netherlands and ING Groep*, C-224/12 P, ECR, EU:C:2014:213, paragraph 33). If the Member State provides it with evidence of the required nature, the Commission must carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether the recipient company would manifestly not have obtained comparable facilities from a private operator (judgment in *Frucona Košice* v *Commission*, cited in paragraph 91 above, EU:C:2013:32, paragraph 73).

97 In this context, it is for the Member State or the public body concerned to communicate to the Commission objective and verifiable evidence showing that its decision is based on economic evaluations comparable to those which, in the circumstances, a rational private operator in a situation as close as possible to that of that State or of that body would have had carried out, before adopting the measure in question, in order to determine its future profitability (see, to that effect, judgments in *Commission* v *EDF and Others*, cited in paragraph 91 above, EU:C:2012:318, paragraph 84 in conjunction with paragraph 105, and of 3 July 2014 in *Spain and Others* v *Commission*, T-319/12 and T-321/12, EU:T:2014:604, paragraph 49).

98 However, the prior economic assessment factors required on the part of the Member State or the public body concerned must be varied depending on the nature and the complexity of the operation in question, the value of the assets, goods or services concerned, and the circumstances of the case (see paragraphs 122, 123, 178 and 179 below).

The second plea in law, alleging infringement of Article 107(1) TFEU, errors of assessment and errors in law in the application of the private investor test and an inadequate statement of reasons in respect of the second measure

99 The second measure concerns excess of loss reinsurance ('XoL reinsurance') cover for marketable risks provided by SACE to Sace BT in 2009. XoL reinsurance is a type of contract in which the reinsurance operates up to a certain limit and only when a particular loss or group of losses exceeds a predefined level.

100 It is common ground between the parties that in the past Sace BT had obtained its own reinsurance principally from private operators. When renewing the contracts for 2009, at the height of the global financial and economic crisis, Sace BT contacted 21 private operators and raised cover from five of them equal to 25.85% of the XoL reinsurance for the part of the losses in excess of EUR 5 million and up to EUR 40 million. The cover subscribed by those five private reinsurers corresponded to 10%, 7.5%, 3%, 2.85% and 2.5% respectively. On 5 June 2009, the remaining part of the cover, 74.15%, was subscribed by SACE on the same terms of priority, capacity and remuneration as those which had been stipulated in Sace BT's annual reinsurance contract for 2009 and had already been accepted by the five private reinsurers.

101 In the contested decision (recitals 126 to 131), the Commission held that, taking into consideration the higher level of risk assumed, a private reinsurer would not have subscribed reinsurance cover of 74.15% for Sace BT on the conditions granted by SACE and that Sace BT had therefore procured an advantage; it based its view in essence on the following considerations:

— the refusal by private reinsurers contacted by SACE at the time of the renewal of the reinsurance agreement for 2009 to cover the remaining part of the excess of loss reinsurance shows that the cover could not have been obtained from the market (recital 127 of the contested decision);

— in the context of the global financial crisis, which triggered more restrictive reinsurance conditions, a number of private reinsurers reduced their activity in this sector and were refocusing on more profitable activities (recital 128);

— in view of the significant losses suffered in 2008 (around EUR 29.5 million), the 'weak situation [of Sace BT] entail[ed] that the risk on the reinsurance was higher' (recital 128);

— a rational private reinsurer 'would never accept to cover such a high percentage as 74.15% and under [the] same conditions as were required by [other] reinsurers for [a] much smaller percentage of reinsurance'. A rational investor would have asked for a fee that takes into account the higher level of risk assumed (recital 128);

— the aid amount was the difference between the fee that a private reinsurer would have charged for such a high portion of reinsurance and the fee that was charged to Sace BT. In line with the Commission's case practice, it considered that the fee for such a high portion of reinsurance and risk should have been at least 10% higher than the fee charged by the private reinsurers for a much smaller part. For an amount of EUR 1.56 million paid by Sace BT to SACE, the aid to be recovered thus amounted to EUR 156 000 (recital 128);

— SACE's contribution (which was higher than 25% of the risks ceded) to Sace BT's reinsurance agreement was contrary to the general principles which that subsidiary had established for itself (recital 128);

— the measures at issue should be analysed in parallel and the fact that SACE is the parent company of Sace BT does not permit the conclusion that it acted as a private company in such a situation would have done (recitals 126 and 129);

— the reinsurance in question allowed Sace BT to increase its credit insurance provision capacity (recitals 126 and 130).

102 The applicants contest the Commission's view that a private reinsurer would not have subscribed the reinsurance cover provided by SACE to Sace BT on the same terms of remuneration as those applied by private reinsurers for a lower level of risk. They also claim that the Commission's evaluation of the aid amount at 10% of the amount of the fee paid by Sace BT to SACE is vitiated by an error of assessment and a defective statement of reasons.

103 It must be examined, first of all, whether the Commission was entitled to consider that, by providing the reinsurance cover at issue to Sace BT on the specified terms, SACE had not acted as a private reinsurer in a similar situation would have done, before determining whether an adequate statement of reasons was given for the Commission's evaluation of the aid amount.

– The comparison of SACE's conduct with the conduct of a private reinsurer

104 The applicants dispute the Commission's arguments alleging that SACE did not act as a private reinsurer would have done. First, the private operators' participation in a small part of the XoL reinsurance cover cannot be explained by risks specific to Sace BT's portfolio, which was characterised by historic performance favourable to reinsurers, but primarily by reticence on the part of operators which were reacting cyclically, in particular by reducing their capacity, to their difficulties and difficulties on the market. Conversely, SACE benefitted from a sound asset base and positive economic performance, which allowed it to seize market opportunities. This is confirmed by the sizeable profit obtained from the reinsurance contract concluded with Sace BT, as SACE had not recorded any loss in respect of fee income amounting to EUR 1.56 million.

105 Second, the Commission wrongly claims in the defence that SACE's consent to Sace BT's XoL reinsurance contract was a choice that was not 'autonomous, but ... determined by the market's refusal to cover more than 25.85% of the reinsurance'. There is no legal requirement or condition of solvency under which Sace BT must have full XoL reinsurance cover. The XoL reinsurance contract at issue offered cover only against certain pre-defined exceptional losses. The purpose of the contract was not therefore to improve Sace BT's current technical performance or to permit it to build additional capacities. The reinsurance cover was arranged by SACE and Sace BT with a view to mutual profit. Sace BT's objective was to reduce extreme risks in order to protect its medium and long-term stability. On the other hand, SACE was interested in the strong diversification of Sace BT's portfolio and by a phase of the economic cycle where insurance premiums were high.

106 Third, the applicants claim that at the time of the adoption of the second measure reinsurance was a product offered by SACE to all market operators on terms equivalent to those granted to Sace BT. SACE did not enter into such contracts with other operators simply because no proposals were made by other operators, as within insurance groups operators obtain preferential cover from their specialist reinsurance companies. There is therefore no reason for the Commission to believe that applications for insurance cover on the same terms as those granted to Sace BT had been rejected.

107 Fourth, the Commission's claim in recital 128 of the contested decision that a private reinsurer would never have accepted to cover such a high reinsurance percentage under the conditions granted by SACE to Sace BT is not supported by any finding from the investigation. As is mentioned in recital 179 of the contested decision, SACE's decision to assume that part of the cover was based on a risk and return analysis of 19 March 2009 carried out by the company's Risk Management Division using the assessment made by the insurance broker AON Re Global, which had considered Sace BT's XoL reinsurance contract to be profitable.

108 Fifth, according to the prevailing economic literature and in the practice of the largest international reinsurers on the market, pricing in reinsurance activity does not depend only on the level of risk involved. Furthermore, the only decision taken by the XoL reinsurers concerned the share of the risk to be reinsured. As far as the fee is concerned, it was negotiated in advance between the transferor, the brokers and the reinsurers and did not vary depending on the reinsurers or the shares of the risks assumed.

109 Sixth, the applicants dispute the Commission's finding in recital 130 of the contested decision that, in essence, the reinsurance cover provided by SACE conferred an advantage on Sace BT, allowing it to increase its credit insurance provision capacity, without supporting the risks in question on its balance sheet or offering remuneration for the remaining part of its reinsurance cover at least 10% higher than that paid to the other private reinsurers. The applicants argue that the volume and the value of the contracts signed in the course of a financial year depend on a number of factors, essentially linked to corporate development targets and their operational sub-variants.

110 The Commission disputes those arguments in their entirety.

111 In order to determine whether SACE acted as a private reinsurer in a similar situation would have done, the Commission had to ascertain, in the light of the relevant information available to it, whether before adopting the second measure SACE had made an appropriate economic assessment of the profitability of that measure having regard to the risks assumed.

112 It should be noted in this regard that even though, in the context of State aid control, the Member State must, in accordance with the duty to cooperate in good faith laid down in Article 4(3) TEU, provide the Commission with the information that will allow it to take a decision on whether the measure at issue contains State aid, the Commission is under an obligation to conduct a diligent and impartial examination (see paragraph 95 above) and to conduct a careful examination of the information which the Member State provides to it (judgment of 30 April 2014 in *Dunamenti Erőmű* v *Commission*, T-179/09, EU:T:2014:236, paragraph 176). In keeping with the intention of the formal investigation procedure, which makes the interested parties the Commission's source of information (see, to that effect, judgment of 31 May 2006 in *Kuwait Petroleum (Nederland)* v *Commission*, T-354/99, ECR, EU:T:2006:137, paragraph 89), that obligation also applies to the Commission in respect of information communicated to it by the interested parties.

113 In its assessment of the conformity of the second measure with the private investor test, in the contested decision the Commission did not explicitly take a view on the content of the note which was drafted on 19 March 2009 by SACE's Risk Management Division in order to determine whether the 'estimated profitability of the reinsurance agreement was in line with the risks taken' and which is relied on by the applicants (see paragraph 107 above). However, that note had been communicated to the Commission by SACE during the administrative procedure, as can be seen from recital 179 of the contested decision, which mentions the note and states that in its meeting on 1 April 2009 SACE's board of directors had approved SACE's participation in Sace BT's excess of loss reinsurance contract for the amount not covered by market reinsurers.

114 The note of 19 March 2009 does have some importance, however. According to the arguments made by the parties and the material in the file, the only economic evaluations on which SACE relied in adopting the second measure, which was discussed for the first time, according to the applicants, at the meeting of SACE's board of directors on 11 February 2009, appeared in the note of 19 March 2009 and in the report by the insurance broker AON Re Global, on which that note was based.

115 In addition, the applicants do not invoke any other document submitted to SACE's board of directors for an examination of that company's participation in Sace BT's reinsurance contract.

116 However, having regard to the comments made by SACE and the Italian authorities in the course of the administrative procedure, the content of the note of 19 March 2009 and the abovementioned report by AON Re Global, it cannot be complained that the Commission did not explicitly rule on the content of that information in the contested decision in order to assess whether the granting of the second measure was based on a prior analysis of its profitability.

117 First, it is not evident from the summary of their comments in paragraphs 68 to 71 of the contested decision, and neither the applicants nor the Italian Republic claim before the Court, that they asserted during the administrative procedure that SACE had conducted a prior analysis of the profitability of the second measure, and thus of its economic rationality, on the basis of the abovementioned documents. During the administrative procedure they stressed the fact that the conditions subscribed by SACE were identical to those accepted by the private reinsurers which participated in the insurance cover for Sace BT.

118 Second, the note of 19 March 2009 was produced by SACE's Risk Management Division, which was asked to determine whether the estimated profitability of Sace BT's reinsurance agreement was in line with the risks taken. The Risk Management Division had given a favourable opinion to SACE's participation in the agreement, primarily on the basis of the report by the insurance broker AON Re Global dated 14 November 2008. That report contained estimations made for Sace BT with a view to the renewal of its reinsurance contract in 2009 based on the analysis of the effect of the 2008 reinsurance contract on Sace BT's results and present and future capital requirements. In the note of 19 March 2009, SACE's Risk Management Division did not, however, update the information dating from 2008. Neither the note of 19 March 2009 nor the report by AON Re Global therefore took account of the financial crisis which had hit the European economy at the end of 2008 and which had caused a deterioration in the economic situation in the euro zone in 2009. In addition, that note did not contain the slightest indication to suggest that the extent of the participation in the agreement envisaged by SACE, representing 74.15%, and thus the extent of its risk exposure, had been taken into consideration in evaluating the estimated profitability of such participation.

119 Consequently, the Commission was not required to take a view in the contested decision on the probative value of the note of 19 March 2009 and the report of 14 November 2008. It was sufficient for it to explain adequately why it considered that private operators would not have agreed to subscribe to the second measure on the conditions granted by SACE.

120 It follows that the Commission did not have any relevant written documents when it analysed whether SACE had acted like a private reinsurer. There are therefore questions as to the consequences to be drawn from the failure to communicate to the Commission evidence of a prior economic evaluation, which is relevant and documented, of the estimated profitability of the second measure in the light of all the factors which a private reinsurer acting in market conditions would have taken into consideration.

121 According to case-law (see paragraph 97 above), it is for the Member State or the public body concerned to show that its decision was based on economic evaluations comparable to those which a rational private operator in a similar situation would have had carried out, before adopting the measure in question, in order to determine the future profitability of such an investment. To that end, the provision, during the administrative procedure, of studies by independent consultancy firms which were commissioned prior to the adoption of the measure in question may help to show that the Member State or the public body implemented that measure as an operator on the market (see, to that effect, judgment in *Spain and Others* v *Commission*, cited in paragraph 97 above, EU:T:2014:604, paragraph 49).

122 However, the evidence of the economic evaluation required from the public body providing the aid must be assessed in each specific case and varies depending on the nature and the extent of the economic risks involved (see paragraph 98 above). In this case, the evaluation of the profitability of

the second measure, which was a commercial transaction, could be conducted on the basis of a relatively limited analysis of the risks assumed and of the appropriateness of the amount of the reinsurance fee in the light of the extent of the risk.

123 In those circumstances, given that the amount of the transaction, while certainly not negligible, was relatively small, the mere fact that SACE did not provide proof that it had conducted a prior economic evaluation of the amount of the premium reflecting the level of risk assumed in order to determine the profitability of the reinsurance cover for Sace BT is not sufficient grounds to consider that it did not act like a private reinsurer in a comparable situation.

124 It is therefore necessary to examine the indicators on which the Commission relied in the contested decision in complaining that SACE had provided the remaining part of the reinsurance cover on the same terms of remuneration as those applied by the private reinsurers for smaller risks.

125 First, of those indicators, the Commission placed particular emphasis on the fact that, despite its many attempts, Sace BT was not able to obtain reinsurance cover above 25.85% from private reinsurers (see paragraph 101, first indent, above). The applicants claim in this regard that the refusal by the private reinsurers in 2009, unlike in the preceding years, to provide reinsurance cover above 25.85% can be explained by the cyclical reduction in their activity in order to address the economic and financial crisis and not by risks linked to Sace BT's portfolio (see paragraph 104 above).

126 Whilst recognising that the crisis was one of the factors in the private reinsurers' refusal to participate in Sace BT's reinsurance contract above 25.85% (see paragraph 100 above), it should be noted that the crisis affected market conditions and increased the risk of losses for all the operators concerned, including SACE, despite its sound asset base and positive business performance, which are invoked by the applicants. The crisis context and the alleged reduction in reinsurance provision could only lead a rational operator to pay greater attention to assessing the risks assumed and the profitability of the operation in question. In this regard, the Commission's assertion in recital 128 of the contested decision that the financial crisis triggered more restrictive reinsurance conditions (see paragraph 101, second indent, above) is not disputed by the applicants.

127 The applicants do not put forward any evidence to suggest that the private reinsurers' assessment of the profitability of a higher level of participation in Sace BT's reinsurance contract, in the light of the extent of the risks assumed, did not play a key role in that refusal. The applicants do claim that an examination of Sace BT's reinsurance agreements from 2009 to 2011 shows that 'the credit rate paid to different reinsurers was the same', even though the shares reinsured by the different private operators ranged from 2.5% to 10% in 2009 (see paragraph 100 above) and from 5% to 15% in 2010 and 2011. Similarly, it is clear from the applicants' answer to a written question asked by the Court that from 2005 to 2008, the period in which Sace BT obtained all its reinsurance cover on the market, the amount of the fee stipulated by the annual reinsurance contracts for cover of all Sace BT's reinsured risks was also paid by Sace BT to the various reinsurers in proportion to their respective levels of participation in those contracts. However, during that period, the levels of cover subscribed by the private reinsurers ranged from 3% to 28%. Those different levels of participation by private reinsurers, on the same terms of remuneration, are nevertheless incommensurate with SACE's 74.15% participation in Sace BT's 2009 reinsurance contract. It is not therefore possible to infer from Sace BT's earlier reinsurance contracts, relied on by the applicants, the correlation which would have been made by private operators in a similar situation between the level of remuneration and the decision to provide reinsurance cover of more than 74%.

128 Second, as regards the controversy as to whether SACE had provided the reinsurance cover at issue to Sace BT in order to compensate for 'the absence of reinsurance capacity' on the market, as is stated in the minutes of the meeting of SACE's board of directors on 26 May 2009, relied on by the Commission, or with a view to mutual profit, as the applicants claim (see paragraph 105 above), it

should be noted that it is common ground that Sace BT was not able to obtain, on the market, the remaining part (74.15%) of its reinsurance cover on the terms of remuneration accepted by SACE (see paragraph 100 above).

129 It should also be noted that it is not evident either from the file or from the documents communicated to the Commission in the administrative procedure and produced by the applicants before the Court at its request that the second measure was seen from the point of view of its profitability for SACE. This is true in particular of the minutes of the meeting of SACE's board of directors on 11 February 2009, during which SACE's participation in Sace BT's 2009 reinsurance contract was deliberated for the first time, the minutes of the meeting of the board of directors on 1 April 2009, during which the adoption of the second measure was approved, and the documents submitted to the board of directors at those two meetings. The minutes of 1 April 2009, which record the approval of SACE's participation in Sace BT's reinsurance contract for the part not accepted by the private reinsurers and under the same conditions as granted by those reinsurers, explicitly show that that participation was decided, 'having regard to the unfavourable economic situation [at the time]', to permit Sace BT to maintain its insurance capacity, in particular in the SME segment. In addition, neither the minutes of the meeting of SACE's board of directors on 26 May 2009 — which note 'SACE's participation in Sace BT's reinsurance programme in accordance with the deliberations of the board of directors on 11 February and 1 April 2009' — nor the documents submitted to the board of directors at that meeting contain information on, in particular, the losses recorded by Sace BT from the beginning of 2009 (see paragraph 134 below) which suggests that the profitability of the reinsurance cover at issue for SACE was taken into consideration before that contract in favour of Sace BT was signed on 5 June 2009.

130 Third, in order to demonstrate the inappropriateness of the amount of the fee paid by Sace BT for the level of risks assumed by SACE, the Commission claims in recital 128 of the contested decision that the significant losses in the order of EUR 29.5 million suffered by Sace BT in 2008 entailed major risks with regard to reinsurance.

131 In this regard, the applicants do not dispute the fact, mentioned in footnote 101 to recital 128 of the contested decision, that, according to the minutes of the inspection conducted on 11 October 2010 by the Istituto per la vigilanza sulle assicurazione private (ISVAP, Italian supervisory administrative authority for private insurance) at Sace BT, produced by the Commission at the Court's request, several private reinsurers which took part in discussions on the renewal of Sace BT's reinsurance had expressed concerns at the undertaking's situation. For example, one of the reinsurers explained that the reasons for its refusal to participate in the 2009 excess of loss reinsurance contract included the high level of losses in the preceding two years and the programme costs. In addition, the Commission explained at the hearing, without being contradicted by the applicants or the Italian Republic, the link between the reinsurers' risk exposure and the financial difficulties suffered by Sace BT in 2008 due to the increase in losses following the crisis.

132 It is true that the applicants and the Italian Republic stated at the hearing that at the time of SACE's subscription of the remaining part of the reinsurance cover for Sace BT, on 5 June 2009, no loss had yet occurred. However, it is not apparent either from the file or from the evidence adduced by the applicants that the absence of losses during the first quarter of 2009, then in the next two months, was taken into consideration by SACE's board of directors when it approved the second measure on 1 April 2009 or when the contract was signed on 5 June 2009, as was stated in paragraph 129 above.

133 In addition, it is not established, nor is it claimed by the applicants or the Italian Republic moreover, that the absence of loss before the subscription of the reinsurance cover at issue on 5 June 2009 had been brought to the Commission's attention in the administrative procedure in order to justify the adoption of the second measure. In accordance with case-law (judgment of 25 June 2008 in *Olympiaki Aeroporia Ypiresies* v *Commission*, cited in paragraph 83 above, EU:T:2008:222, paragraph 56; see also, to that effect, judgments of 1 July 2008 in *Chronopost and The Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, ECR, EU:C:2008:375, paragraph 144, and *Commission* v

Scott, cited in paragraph 95 above, EU:C:2010:480, paragraph 91), the lawfulness of the contested decision is to be assessed in the light of the information available to the Commission when the decision was adopted. In so far as the applicants and the Italian Republic did not communicate that information to the Commission in the course of the administrative procedure, they cannot therefore, in contesting the lawfulness of the contested decision, rely on the fact that no loss had been recorded in the five months preceding the subscription of the reinsurance cover at issue for Sace BT, such that the risks assumed by SACE were smaller (see, to that effect, judgment of 13 June 2002 in *Netherlands* v *Commission*, C-382/99, ECR, EU:C:2002:363, paragraph 76). Furthermore, and in any event, the Commission rightly pointed out at the hearing that the new argument based on the absence of losses in the first five months of 2009, relied on for the first time during the hearing, was inadmissible under Article 48(2) of the Statute of the Court of Justice of the European Union. That argument cannot be regarded as a development of the vague and unsubstantiated reliance by the applicants in the application on the 'historic performance favourable to reinsurers' of Sace BT's portfolio (see paragraph 104 above).

134 Lastly, according to case-law, the retrospective finding, relied on by SACE in the administrative procedure, that the second measure actually permitted that company to procure a substantial economic advantage in 2009, as no loss was recorded in respect of premium income amounting to EUR 1.56 million, is irrelevant in so far as it is based on a situation later than the adoption of the second measure (see paragraph 93 above).

135 Fourth, the Commission notes at the end of recital 128 of the contested decision that the allocation of such a high portion of reinsurance to one single company might not have been in compliance with the general principles of reinsurance, as the ISVAP had observed in the minutes of its inspection at Sace BT on 11 October 2010. In this regard, it is clear from the explanations given by the applicants and from those minutes that in its deliberations on 22 April 2008 Sace BT's board of directors had decided that the number of reinsurers participating in its reinsurance contract had to guarantee an appropriate allocation of risks between them and that no reinsurer should be required to cover a reinsurance level above 25%. This confirms that Sace BT turned to its parent company in 2009 because it had been able to obtain total reinsurance cover of only 25.85% on the market despite its numerous attempts.

136 This evidence bears out the lack of economic rationality of SACE's decision to offer its subsidiary cover representing almost three times the maximum of 25% identified by the ISVAP and defined by Sace BT, especially since in practice SACE had never offered reinsurance contracts previously, even though Article 6(4) of its Articles of Association authorises it to offer such contracts provided they are stipulated under market conditions (see paragraph 106 above).

137 Fifth, with regard to the question whether the private reinsurers' decision to participate in a reinsurance contract and their level of participation depend in particular on the level of remuneration offered in the light of the extent of the risks assumed (see paragraph 108 above), the applicants' claims must be rejected. The negotiation process for the terms of remuneration offered in a reinsurance contract certainly does not mean that the level of remuneration offered by the reinsurance contract at the end of the negotiations does not have a significant effect on the private reinsurers' decision whether or not to participate in the contract and on the share of the risk which they might agree to cover. In addition, with regard to the legal process which could permit a reinsurer like SACE, in return for provision of the remaining part of the reinsurance cover for Sace BT, to obtain remuneration higher than that under the 2009 reinsurance contract entered into by private reinsurers at an overall level of 25.85%, the Commission stated at the hearing, in response to a question asked by the Court, that Sace BT's abovementioned reinsurance contract related to only 25% of the risks reinsured by that company. Consequently, another reinsurance contract, which provided for different remuneration, could have been negotiated in respect of the remaining part of Sace BT's reinsurance cover for 2009, which neither the applicants nor the Italian Republic disputed at the hearing.

138 Furthermore, the applicants' argument that according to the prevailing economic literature pricing for a reinsurance contract depends on a number of factors, such as contingent market situations and the propensity of the operators concerned to favour certain categories of risks, does not mean that the extent of the risks assumed is merely a negligible factor in terms of pricing.

139 Lastly, the argument put forward by the applicants (see paragraph 108 above) relating to the practice of the largest international reinsurers does not prove the existence, in the circumstances of the case, of a negligible correlation between the level of risks assumed and the level of remuneration. That argument is based on the letter of 18 April 2013 from AON Benfield Italia SpA Insurance & Reinsurance Brokers to Sace BT, which states that they '[could] confirm, based on [their] experience as a leading reinsurance broker, that in principle the cost (fees or charges) of a proportional or XL contract does not depend on the share of participation (and vice versa)'. The applicants further claim that the second measure is equivalent to the common cases where large shares of risk, above 50%, are assumed by parent companies.

140 It is true that the abovementioned letter, although later than the adoption of the contested decision, is based on information available when the second measure was adopted. However, neither the content of the letter nor the argument regarding parent companies relates specifically to excess of loss reinsurance contracts. By virtue of their general nature, those elements cannot invalidate the Commission's findings based, in the light of the information available to it, on the context of the present dispute, in which private reinsurers refused to participate more broadly in Sace BT's reinsurance agreement, and on the inappropriateness of the amount of the fee in view of the level of risk assumed, having regard to the extent of SACE's participation in the reinsurance cover.

141 Sixth, contrary to the applicants' claims (see paragraph 109 above), SACE's provision of reinsurance cover for Sace BT on price conditions other than those stemming from market forces does in itself constitute an advantage within the meaning of Article 107(1) TFEU. Furthermore, the applicants do not dispute that SACE itself recognised in the administrative procedure that that reinsurance cover allowed Sace BT to increase its credit insurance provision capacity. In addition, the applicants' argument that there is no proportional and quantifiable relationship between the share of the activity ceded to reinsurance and the subscribed capacity has no bearing on the Commission's assertion in recital 130 of the contested decision that without such cover Sace BT would have had to support the risks in question on its balance sheet or offer a premium at least 10% higher in order to obtain reinsurance. Consequently, the applicants cannot legitimately complain that the Commission failed to establish what Sace BT's credit insurance provision capacity would have been without the reinsurance cover provided by SACE, because the advantage procured by Sace BT, which it would not have obtained in normal market conditions, consisted precisely in the preferential price conditions granted by SACE.

142 In the light of all these considerations, it must be stated that, having regard to the information available to it when the contested decision was adopted, the Commission was entitled to conclude that the second measure had been adopted in favour of Sace BT on preferential price conditions and that the advantage thus conferred on Sace BT consisted in the difference between the reinsurance fee that a private reinsurer would have charged for such a high portion of reinsurance and the fee that was charged by SACE.

143 In those circumstances, the applicants' arguments raised at the reply stage, which seek to challenge the Commission's finding in recital 129 of the contested decision that the conclusion of the reinsurance contract had to be analysed together with the capital injections in order to determine whether a private parent company would have agreed to provide its subsidiary with reinsurance cover on preferential terms in relation to the market price, where the subsidiary does not obtain such cover at the proposed price, must be rejected.

– The alleged failure to state reasons for the assessment of the aid amount

144 As regards the method employed by the Commission to determine the aid amount to be recovered, the contested decision simply states in recital 128 that '[i]n line with the Commission's case practice, the Commission considers that the fee for such a high portion of reinsurance and risk should have been at least 10% higher than the fee charged by the private reinsurers for the smaller part of reinsurance and risk' and that '[f]or an amount of EUR 1.56 million paid by Sace BT to SACE, the aid amounts to EUR 156 000'. The contested decision makes reference in this regard to Commission Decision 2014/532/EU of 23 November 2011 on State aid No C 28/10 implemented by Portugal for the short-term export-credit insurance scheme (OJ 2014 L 244, p. 59), in which the Commission developed a method for calculating the amount to be recovered based on reasonable assumptions and on common market practice ('the decision of 23 November 2011').

145 The applicants complain that the Commission did not explain why it considers that the amount of the fee paid by Sace BT should have been 10% higher than the amount of the fee charged by the private reinsurers.

146 In order to establish that the fee paid to SACE was inadequate compared with the fee paid by Sace BT to the other participants in the reinsurance contract, the Commission merely referred to the decision of 23 November 2011. The statement of reasons for that decision in respect of the theoretical quantification of the market price of cover provided by the State equal to 110% of the price charged by the private insurer in the case of each client is incomprehensible. In addition, in the present case the Commission did not explain why that method of calculation, which was developed for a proportional public insurance scheme, which operates as ('top-up') mechanism for sharing risks with private insurers and which is entirely distinct from excess of loss reinsurance, could be applied analogously to the second measure. Furthermore, the Commission erred in considering that the principle of positive correlation between the volume of risk and the level of the fee, which was established for proportional insurance, was applicable to reinsurance.

147 The Commission claims that in view of the difficulty in determining the amount of the premium which would have been charged by private operators, in that the only fact known with any certainty was their refusal jointly to cover more than 25.85% of the risk, it adopted a cautious approach. The calculation made to obtain the percentage of 10% was based on the Portuguese precedent examined in the decision of 23 November 2011, for which the Commission had developed a method to calculate the increase in the premium in relation to an increase in the risk as a result of higher exposure in terms of insurance.

148 The main and only relevant difference between the two cases lies in the fact that SACE not only carried out an additional ('top-up') operation to cover the part of the risk not covered by the market operators, but also assumed a percentage of the risk much higher than that accepted by the private operators, the main one of which had assumed 10% of the risks.

149 According to case-law, if the Commission does decide to order the recovery of a specific amount, as in the present case, it must, pursuant to its obligation to conduct a diligent and impartial examination, assess as accurately as the circumstances of the case will allow, the actual value of the benefit received from the aid by the beneficiary (judgment in *Dunamenti Erőmű* v *Commission*, cited in paragraph 112 above, EU:T:2014:236, paragraph 177).

150 In addition, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the

addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 8 September 2011 in *Commission* v *Netherlands*, C-279/08 P, ECR, EU:C:2011:551, paragraph 125 and the case-law cited).

151 In the present case, in determining the aid amount, in the contested decision the Commission simply referred to its 'case practice', which consists only in the decision of 23 November 2011.

152 In this regard, it should be recalled that according to case-law aid is a legal concept which must be interpreted on the basis of objective factors. The classification of a measure as State aid cannot therefore depend on a subjective assessment by the Commission and must be determined regardless of any previous administrative practice of that institution, assuming that it is established (see judgment in *Spain and Others* v *Commission*, cited in paragraph 97 above, EU:T:2014:604, paragraph 46 and the case-law cited).

153 Consequently, in order to establish the existence of aid, the Commission cannot simply refer to its 'case practice'. It must carry out a diligent and impartial analysis, in the light of the applicable rules, of all the objective factors at its disposal. The same is true where the Commission determines the aid amount to be recovered. Consequently, in this case, the Commission could not simply refer to the decision of 23 November 2011, but was required to conduct a diligent and impartial examination of the objective factors available in order to determine the aid amount as accurately as possible.

154 In addition, in the present case the Court is required to review the lawfulness of the contested decision and not to rule on whether or not there is a proper statement of reasons for the decision of 23 November 2011, as the applicants claim (see paragraph 146 above). Accordingly, the Commission cannot fulfil its obligation to state reasons in these circumstances simply by referring to a methodology developed in another case without any explanation of the relevance of that methodology in assessing the reinsurance premiums paid by Sace BT to SACE in a different factual context (see paragraphs 152 and 153 above).

155 In those circumstances, if the Commission wished to apply to this case the method for calculating the sum to be recovered developed in the decision of 23 November 2011, it had to explain why it considered that that method was relevant and to disclose the reasoning followed in this instance in applying it in the light of the material in the file.

156 In this respect, the applicants rightly argue that in the contested decision the Commission neither specified the method of calculation applied nor stated the reasons, having regard of the nature and the characteristics of the excess of loss reinsurance at issue, for applying a method of calculating the fee developed for a proportional public credit insurance scheme.

157 First, it is true that the Portuguese export-credit insurance scheme to which the Commission refers differs from the present circumstances. It was an export-credit co-insurance scheme and not a scheme for reinsurance of an insurer. Furthermore, the Portuguese scheme, which was to last from 1 January 2009 to 31 December 2010 (recital 23 of the decision of 23 November 2011), was introduced in the context of the 2009 financial crisis and was not directed at the specific financial situation of a single insurer, like Sace BT, which suffered losses. In particular, according to recitals 20 and 21 of the decision of 23 November 2011, the amount covered by the Portuguese public credit insurance scheme, only as a supplement to the cover provided by a private insurer, could never exceed the amount covered by the private insurer. Against this background, in recital 68 of the decision of 23 November 2011 the Commission criticised the fact that the fees paid to public insurers were lower than fees charged on the market when, according to the Commission, those fees should have been higher on account of the higher level of risk assumed. In contrast, in the present case, the

Commission complains that SACE accepted the same remuneration as the private insurers for a higher part of the reinsurance cover than was accepted by the private reinsurers. The circumstances of two cases are therefore entirely different.

158 It is true that the Commission submitted in the defence that the differences between the two measures were irrelevant because in both cases the public body which provides supplementary cover assumes a higher part of the risk, which will normally be reflected in a higher insurance premium (see paragraph 148 above).

159 However, neither that assertion nor the grounds of the contested decision explain why, in view of the level of risk, the market price for the reinsurance cover provided by SACE should be calculated using the same method as for the market price for supplementary insurance cover provided under the Portuguese public credit insurance scheme. The contested decision thus fails to state any reasons in respect of the possibility of applying to this case, in an entirely different legal context, the method of calculating the fee developed by the Commission in the decision of 23 November 2011. In recital 128 of the contested decision the Commission merely states that a 'rational investor would have asked for a fee that takes into account the higher level of risk assumed' and that the fee 'should have been at least 10% higher than the fee charged by the private reinsurers for the smaller part of reinsurance and risk', referring, without any explanation, to recitals 68 and 93 of the decision of 23 November 2011.

160 Furthermore, the Commission's argument that the methodology used was favourable for the applicants cannot remedy that defective statement of reasons. Without a clear and relevant explanation in relation to the case at issue, it is not possible to determine whether the 10% correction is favourable or unfavourable for the applicants. In addition, the Commission must define the appropriate corrective measure to put an end to the distortion of competition resulting from the contested measure. It cannot fulfil that task simply by referring to a methodology which it considers to be advantageous for the beneficiary.

161 Accordingly, the second plea in law must be upheld in so far as it alleges an inadequate statement of reasons for the Commission's assessment of the aid amount at 10% of the amount of the fee paid by Sace BT to SACE.

The third plea in law, alleging infringement of Article 107(1) TFEU and errors of assessment and errors in law in the application of the private investor test in respect of the third and fourth measures

162 In the contested decision (recitals 132 to 168) the Commission concluded that the third and fourth measures constituted an advantage for Sace BT, relying on two kinds of considerations. It stated in recitals 135 to 144 of the contested decision that SACE had not acted like a prudent private investor in that, when adopting those measures, it had not evaluated whether providing the additional capital was an economically more beneficial scenario for it as a shareholder than the liquidation of the subsidiary. For this reason alone, the two capital contributions at issue must, according to the Commission, be classified as aid.

163 The Commission also found, 'for the sake of completeness', in recitals 145 to 167 of the contested decision that by comparing the scenario of the liquidation of Sace BT with the chosen path to inject further capital into that subsidiary, a prudent private investor would have preferred to let Sace BT go bankrupt, or sell it, if a buyer could be found, instead of proceeding with its recapitalisation. That analysis also showed that SACE did not behave like a private investor.

164 The applicants challenge both the absence of a prior economic analysis claimed by the Commission and the validity of its retrospective analysis of the profitability of the third and fourth measures.

165 It is necessary first to examine the parties' arguments on whether SACE conducted an appropriate profitability analysis before investing EUR 70 million in Sace BT.

166 As a preliminary point, the applicants state that it follows, inter alia, from paragraphs 27 and 29 of the Commission communication on the application of Articles [107 TFEU] and [108 TFEU] and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ 1993 C 307, p. 3) that, when applying the private investor in a market economy test, the Commission is required to respect the wide margin of assessment enjoyed by the public investor and to find that aid exists only where it is apparent that there are no objective grounds for the public investor reasonably to expect an investment to have an acceptable rate of return, even in the long term.

167 In this case, the applicants complain that the Commission held that being in a crisis situation had no effect on the conditions to be applied for the test.

168 First, the applicants claim in this regard that the Commission was required to investigate with the utmost objectivity and attention the economic reality on the market and the way in which the investment decisions of a hypothetical private shareholder were influenced by 'the high level of uncertainty and urgency' (recital 166 of the contested decision) resulting from the deterioration of the global economic situation from the second quarter of 2007.

169 Second, the applicants allege that in the course 2008 and 2009, in view of the significant losses suffered by many undertakings operating in the credit insurance sector and the small number of potential buyers, the shareholders in many companies, including those outside Italy, made capital contributions. At the hearing the applicants complained in particular that the Commission did not conduct an investigation to compare, for the purposes of the application of the private investor test, Sace BT's situation with that of other insurers, including the complainant, Coface, which was recapitalised in July 2009 and in March 2010 in an amount of EUR 225 million, after suffering losses of EUR 163 million in 2009.

170 Third, the applicants dispute the Commission's interpretation of the judgment in *Commission* v *EDF and Others*, cited in paragraph 91 above (EU:C:2012:318). Paragraph 84 of that judgment stresses the need to take the 'circumstances' into consideration. Consequently, the public investor's compliance with the requirement of a detailed business plan, or at least updated financial data showing that the investment will yield an acceptable economic return, should be assessed in the light of the context of the economic crisis and the inability to make reliable projections.

171 Fourth, the applicants claim that the Commission followed a dogmatic approach in the present case consisting in comparing the decisions of a public investor with those of a hypothetical private investor, characterised by an ability to provide an automatic justification for the economic logic of its business decisions, by developing detailed economic projections, estimations of future profitability or detailed, full cost/profit analyses, corroborated where necessary by reports by external consultants. In the absence of such documentation, the Commission found a lack of economic rationality for the operation.

172 Such a theoretical approach spared the Commission from complex investigations of the 'market economy' as it operates in practice. The Commission thus turned the private investor test in a procedural rule, which is contrary to the principle of equal treatment of public and private undertakings under Article 345 TFEU.

173 Fifth, the applicants acknowledge that in so far as the context did not permit reliable projections to be made, even in the short term, Sace BT's 2010-2011 business plan, on which SACE's management relied, only contained projections for those two financial years and envisaged a balanced budget for

2011. However, the contested decision (recital 141) is erroneous in that it holds that in the administrative procedure SACE did not communicate objective and verifiable information providing the business justifications for the adoption of the two measures at issue.

174 Sixth, the applicants claim that when the third and the fourth measures were adopted SACE's management used an accurate, rational economic evaluation of the future profitability of those investments, based on the following considerations:

— after establishing Sace BT, as part of a business strategy of diversification of the risks insured by the Group, through an initial investment of more than EUR 100 million, SACE decided to protect the value of its initial capital contribution to Sace BT rather than liquidating it and losing almost all that contribution;

— Sace BT made its first public operating profit of EUR 59 000 in 2007, in accordance with projections, and did not start to record losses until after the beginning of the crisis, in an economic context where, in the credit insurance sector in particular, there was a dramatic increase in the volume of losses and a corresponding reduction in the solvency margins of the undertakings in that sector;

— in that context, SACE considered that Sace BT's inability to generate profits before the crisis, when it was still a start-up, did not stem from structural problems, poor business management or 'systemic' problems within the credit insurance market;

— SACE therefore took the view that it was reasonable not to withdraw from the plan to diversify activities which had just been initiated merely because the economic climate was negative and the investment had not yet grown;

— the capital contribution in question, which was intended to restore the undertaking's financial stability and to guarantee its solvency in accordance with Italian sectoral rules, was to allow Sace BT to achieve an adequate return once the macroeconomic situation had normalised and draconian personnel measures had been implemented as from January 2009 — and not, as the Commission claims in the defence, in December 2009 — when the 2010-2011 business plan was revised;

— the liquidation of Sace BT at the market price was considered, then rejected as less advantageous. The capital injections into Sace BT corresponded to 17.8% of the net profits achieved by SACE in 2009 (and around 1.3% of its share capital). Conversely, liquidation would have been devastating economically, as it would have been seen as a signal of a hidden internal cash flow crisis for the shareholder, which would have damaged SACE's public image and exposed it to the risk of a sharp fall in value or a deterioration of its rating well in excess of the amount of around EUR 24 million represented by Sace BT's estimated remaining capital at the end of the 2009 financial year.

175 The Commission disputes those arguments in their entirety.

176 The parties' positions differ in respect of the requirements relating to evidence of a prior economic evaluation of the profitability of the investment which must be provided by the public investor concerned. It must therefore be examined, first, whether the contested decision is vitiated by an error in law in this regard (see paragraphs 177 to 189 below), before then determining whether the Commission made an error of assessment in this case in holding that the third and fourth measures were not compliant with the private investor test (see paragraphs 190 to 199 below).

177 In the first place, with respect to the requirements linked to the public investor test, the applicants acknowledge that the public investor must prove that it carried out an economic evaluation prior to or at the same time as the granting of the economic advantage. They consider, however, that in a context of a serious economic crisis, a rational private investor could conduct accurate, rational prior economic evaluations even if it is not able to rely on analyses of future profitability.

178 In this regard, it should be recalled that, for the purposes of applying the private investor test, the evidence required from the public investor concerned of an economic evaluation conducted prior to the decision to make an investment must be assessed by making a comparison with the economic evaluations which a rational private investor in a similar situation would have had carried out before proceeding with the investment, having regard to the available information and foreseeable developments. The content and the degree of accuracy of such assessments may therefore depend in particular on the circumstances of the case, the market situation and the economic climate (see paragraph 98 above).

179 Thus, in a context of an economic crisis, the assessment of the required evidence of a prior evaluation must be made in the light of, as the case may be, the inability to make reliable, detailed forecasts of developments in the economic situation and the performance of different operators. In those circumstances, it cannot be concluded from the mere absence of a detailed business plan for the subsidiary, containing accurate, full estimations of its future profitability and detailed cost/profit analyses, that the public investor did not act as a private investor would have done.

180 In addition, it cannot be ruled out that, within the scope of the margin of assessment which it enjoys in its prior economic evaluation of the profitability of an investment (see paragraph 188 below), a rational private investor would, like SACE, consider that its subsidiary's difficulties did not stem from structural problems or poor management, but from economic problems within the market concerned (see paragraph 174 above) and would proceed on the basis of the prospect of a gradual restoration of the economic situation. However, even in this case, a rational private investor which is unable to make detailed, full projections would not decide to inject additional capital into one of its subsidiaries which has recorded significant losses without conducting prior evaluations, even general evaluations, showing that there are reasonable probabilities of future profit, and without analysing various scenarios and various options, including, if necessary, the possible sale or liquidation of the subsidiary.

181 According to case-law, in order to assess whether a public investor's contribution to an undertaking's capital is compliant with the private investor test, the conduct of a private investor with which the conduct of a public investor must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term. That conduct must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectorial — and be guided by prospects of profitability in the longer term (judgments of 21 March 1991 in *Italy* v *Commission*, C-305/89, ECR, EU:C:1991:142, paragraph 20, and *Spain and Others* v *Commission*, cited in paragraph 97 above, EU:T:2014:604, paragraph 41).

182 The fact remains that the inability to make detailed, full projections cannot relieve a public investor of its task of carrying out an appropriate prior evaluation of the profitability of its investment, comparable to that which a private investor would have had carried out in a similar situation, having regard to the available and foreseeable information (see paragraph 180 above). In this regard, the Commission rightly notes that if the Member State does not submit to it the required evidence of a prior evaluation, it is not obliged to conduct additional analyses (see paragraph 97 above).

183 Consequently, the fact relied on by the applicants (see paragraph 169 above) that in the course of the period in question a large number of private insurance companies were recapitalised in order to cover significant losses suffered by reason of the economic crisis was not such as to exempt a public investor like SACE from its obligation to conduct a prior evaluation of the future profitability of its subsidiary

and to communicate to the Commission appropriate evidence of a prior evaluation (see paragraph 182 above). Furthermore, it cannot be ruled out that those recapitalisations also gave rise to aid within the meaning of Article 107(1) TFEU. Consequently, the Commission was not required to compare Sace BT's situation with that of other insurers.

184 In these circumstances, it must be stated that in the contested decision the Commission merely applied the well-established case-law according to which, whilst it is for the Commission to apply the private investor test and to request the Member State concerned to provide it with all relevant information to that end, it is the responsibility of that Member State or, in this case, the public undertaking concerned to provide evidence showing that it conducted a prior economic evaluation of the profitability of the measure in question, comparable to that which a private investor would have had carried out in a similar situation (see paragraphs 96, 97 and 112 above).

185 Contrary to the applicants' claims (see paragraphs 171 and 172 above), that requirement does not establish a procedural rule or shift the burden of proof for the existence of State aid on the Commission, but merely requires the public investor concerned to provide the Commission with the necessary information to enable it to determine whether the attitude of the public undertaking was comparable to the attitude of a rational private investor, which would have conducted a prior economic evaluation based on the available information and foreseeable developments which was appropriate having regard to the nature, the complexity, the size and the context of the operation in question (see paragraphs 178 and 179 above).

186 Where the public undertaking provides the Commission with evidence of the required nature, the Commission must, however, conduct an overall assessment, taking into account, in addition to the information provided by that undertaking, all other relevant evidence enabling it to determine whether the measure in question is compliant with the private investor test. The public undertaking concerned thus has the opportunity in the administrative procedure to produce additional evidence which is generated after the adoption of the measure but is based on the available information and foreseeable developments at the time of adoption.

187 In those circumstances, the applicants' arguments based, on the one hand, on the principle of equal treatment between the public and private sectors and, on the other, on the private investor's margin of assessment (see paragraphs 166 and 172 above) must be rejected. First, in so far as the requirement of a prior economic evaluation seeks only to compare the conduct of the public undertaking concerned with that of a rational private investor in a similar situation, that requirement is consistent with the principle of equal treatment between the public and private sectors, implying that the Member States may invest in economic activities and that the capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid (judgment in *Spain and Others* v *Commission*, cited in paragraph 97 above, EU:T:2014:604, paragraph 79).

188 Second, the margin of assessment available to the public investor, according to case-law, cannot relieve it of the task of conducting an appropriate prior economic evaluation. It is true that a distinction may be made between an estimate of the probable return on a project, where there is a certain margin of assessment for the public investor, and the examination which that investor makes in order to determine whether the return seems to it to be sufficient in order to make the investment in question, where the margin of assessment is narrower, since it is possible to compare the transaction in question with other possibilities for investing the capital (judgment in *Spain and Others* v *Commission*, cited in paragraph 97 above, EU:T:2014:604, paragraph 71). However, the margin of assessment available to the public investor in respect of the estimate of the probable return on a project cannot exempt the investor from the obligation to conduct an economic evaluation based on an analysis of the available information and foreseeable developments which is appropriate having regard to the nature, the complexity, the size and the context of the operation (see paragraphs 98 and 180 above).

189 Consequently, in these circumstances, the Commission cannot be criticised for having erred in law in applying the private investor test in the present case.

190 In the second place, it must be determined whether the Commission made an error of assessment in considering in the contested decision that SACE had not conducted an evaluation of the profitability of the capital contributions at issue comparable to that which, in the circumstances of the case, a private investor in a similar situation would have had carried out.

191 In this regard, it must be stated that the documents before the Court, and in particular the minutes of the meeting of SACE's board of directors on 1 April 2009, in the course of which the need of a recapitalisation of Sace BT totalling EUR 70 million had been planned, and the minutes of the meeting on 26 May 2009, in the course of which the third measure relating to a capital contribution of EUR 29 million was adopted, produced by the Commission, do not contain the slightest evidence to suggest that SACE conducted an economic evaluation, even a general evaluation, to determine whether the additional capital contribution was an economically profitable option. Those minutes refer only to the need to constitute adequate assets for Sace BT to cover the reserves at the end of 2009.

192 In addition, it should be noted that the applicants have not produced any evidence that a prior economic evaluation was conducted. In addition, whilst claiming that the third and fourth measures are based on an accurate, rational economic evaluation of the future profitability of those investments, they do not indicate the information based on which such an evaluation was conducted, but merely make general claims (see paragraph 173 above).

193 Against this background, the Commission rightly notes that the only specific evidence relied on by the applicants is the 2010-2011 business plan adopted by Sace BT's board of directors on 4 August 2009. The applicants do not dispute that that plan was taken into consideration only when SACE adopted the fourth measure. In addition, the plan covers a period of just two years and does not envisage a return to profitability in the medium or long term.

194 It is true that, as is shown by the minutes of the meeting of Sace BT's board of directors on 4 August 2009, produced by the applicants at the Court's request, under the plan Sace BT would return to break-even accounts in 2011.

195 However, the plan did not contain any evidence of an analysis of the profitability of the capital injections. Furthermore, whilst projecting a significant improvement in Sace BT's credit insurance ratios, which would allow it to return to break-even, the plan provided only few main financial ratios and figures for 2010 and 2011 in support of that estimate. It did not detail how the reduction of costs would be achieved or how risks would be assessed and referred in general terms, in respect of 2010, to maintaining a risk selection policy and, in respect of 2011, to the forecast of an improvement of the economic and market scenario.

196 It is further clear from Sace BT's 2010-2011 business plan and from the minutes of the meeting of its board of directors on 4 August 2009 that Sace BT's objectives were focused on pursuing a competition policy to increase the company's market share, which was 8.2% in 2008, in order to achieve a market share of 15% in 2011.

197 Therefore, in the absence of any projection that Sace BT could generate profits after 2011, at least in the longer term, the Commission was entitled to hold that the evidence of a prior evaluation contained in the business plan and the abovementioned minutes did not satisfy the requirements of the private investor test.

198 Even if it were accepted that a private investor in a similar situation could have taken account of the fact that the losses suffered by Sace BT were cyclical in nature and, counting on a gradual improvement of the economic situation, preferred in the short term to increase its subsidiary's market shares, the fact remains that it would have conducted a more rigorous evaluation of the economic rationality of the capital contributions at issue, in view of the nature and the size of those operations, in order to assess the prospects of its subsidiary's profitability in the longer term and, if the estimates were satisfactory, without even obtaining an estimate of the costs of liquidating its subsidiary (see paragraph 161 above).

199 In the light of all these considerations, the Commission did not make an error of assessment in holding that, in the absence of an appropriate prior economic evaluation of their economic profitability, the two capital contributions in question were not compliant with the private investor test (see paragraph 182 above).

200 In those circumstances, the third plea in law must be rejected without it being necessary to examine the validity of the additional retrospective assessment conducted by the Commission, for the sake of completeness, of the profitability of the capital contributions at issue compared with the liquidation scenario (see paragraphs 163 and 164 above).

201 Accordingly, the second paragraph of Article 2 of the contested decision must be annulled (see paragraph 161 above). The action is dismissed as to the remainder.

Costs

202 Under Article 87(3) of its Rules of Procedure, where each party succeeds on some and fails on other heads, the General Court may order that the costs be shared or that each party bear its own costs. Under Article 87(4) of the Rules of Procedure, the Member States which intervened in the proceedings must bear their own costs. Since both parties have been partially unsuccessful, each party should be ordered to bear its own costs, including those relating to the interim proceedings.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. **Annuls the second paragraph of Article 2 of Commission Decision 2014/525/EU of 20 March 2013 on the measures SA.23425 (11/C) (ex NN 41/10) implemented by Italy in 2004 and 2009 for Sace BT SpA;**

2. **Dismisses the action as to the remainder;**

3. **Orders Servizi assicurativi del commercio estero SpA (SACE) and Sace BT to bear their own costs, including those relating to the interim proceedings;**

4. **Orders the European Commission to bear its own costs, including those relating to the interim proceedings;**

5. **Orders the Italian Republic to bear its own costs, including those relating to the interim proceedings.**

Van der Woude Wiszniewska-Białecka Ulloa Rubio

Delivered in open court in Luxembourg on 25 June 2015.

[Signatures]

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